No. 95-34 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DR. LEONARD JEFFRIES, JR.,

Petitioner,

—against—

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GIUDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, upon remand for reconsideration in light of *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994), the Court of Appeals correctly applied the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) to the facts of this case.

PARTIES

The appellee below, Leonard Jeffries, Jr., is the petitioner here.

The following parties were appellants in the court below and are respondents here: Bernard W. Harleston, formerly President of The City College of The City University of New York ("City College"); W. Ann Reynolds, Chancellor of The City University of New York ("The City University"); and James P. Murphy, Edith B. Everett, Herman Badillo, Sylvia Bloom, Gladys Carrion, Louis C. Cenci, Michael J. Del Giudice, Stanley Fink, William R. Howard, Harold M. Jacobs, Susan Moore Mouner, Calvin O. Pressley, and Thomas Tam, members of the Board of Trustees of The City University.

Trustees Murphy, Carrion, Cenci, Del Giudice, Fink, Howard, Mouner, Pressley, and Tam were adjudicated not liable in the district court and participated in the appeals and earlier review in this Court only to seek reversal of the order reinstating petitioner as Chair of the Black Studies Department at City College. Petitioner has since served out the entire term to which he was reinstated and did not seek election to a new term. A new Chair was elected to a three-year term commencing July 1, 1995.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents submit this brief in opposition to the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals that petitioner asks this Court to review is reported at 52 F.3d 9 and is reproduced in the Appendix at 1a. The prior opinion of the Court of Appeals, dated April 18, 1994, is reported at 21 F.3d 1238 and is reproduced in the Appendix at 50a. The opinions and orders of the District Court, dated March 31, 1993, April 21, 1993, and May 11, 1993 are reported at 820 F. Supp. 736, 820 F. Supp. 739, and 820 F. Supp. 741 and reproduced in the Appendix at 86a, 82a, and 76a respectively.

STATEMENT OF THE CASE

On remand, the Court of Appeals for the Second Circuit did exactly what this Court directed it to do—it applied the legal standard reaffirmed in *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994) and, after conducting the balancing required by *Pickering v. Board of Education*, 391 U.S. 563 (1968), concluded that the potential impact of petitioner's speech on The City University's operations outweighed petitioner's First Amendment interest in that speech. This particular application of settled principles to specific facts raises no issues of general importance beyond the correct determination of a single case. Moreover, there is no conflict among the lower courts on the standard to be applied. Therefore, the petition presents no issue warranting further reeview by this Court.

A. Factual Background

Petitioner was a tenured professor in and Chair of the Black Studies Department at City College.[1] On July 21, 1991, peti-

[1] As will appear, petitioner served out his full term as Chair. He elected not to stand for re-election, and, since July 1, 1995, another member of the Department has served as Chair. Petitioner was and remains a tenured full professor. His status as such was never at issue.

tioner made a speech before the Empire State Black Arts and Cultural Festival in Albany, New York, that was videotaped and later televised. (54a-55a) Although the principal subject matter of the speech was the controversy over efforts, including petitioner's, to develop and implement a multicultural curriculum for New York State's public schools, petitioner devoted much of the speech to personal attacks and slurs against caucasians in general and Jews and Italians in particular. *See* 54a-55a, 78a.

The speech provoked intense public controversy, almost none of it concerning petitioner's views on the multicultural curriculum. Certain respondents issued statements deploring petitioner's remarks, and respondent Bernard Harleston, then President of City College, initiated a review by the Provost to determine whether the controversy surrounding the speech would limit petitioner's effectiveness as Department Chair.[2] After the Provost's review proved inconclusive, President Harleston consulted with Chancellor W. Ann Reynolds. At the October 1991 meeting of the Board of Trustees, they jointly recommended petitioner's appointment to a one-year term in order to allow further consideration of whether petitioner could serve effectively as Department Chair for a full three-year term. (55a-56a) Most of the Trustees concurred in the recommendation. Trustees Edith Everett, Herman Badillo, Blanche Bernstein[3], and Harold Jacobs sought unsuccessfully to deny his reappointment entirely. Trustee Sylvia Bloom, who had also expressed opposition to petitioner's reappointment, abstained. (56a-57a)

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[2] Petitioner had been re-elected by the Department to the standard three-year term as Chair before the controversy over the speech arose. A clerical mishap had, however, prevented the Board of Trustees from acting to confirm his and 15 other department Chair appointments from City College before the summer recess. Those appointments were deferred to the Board's October 1991 meeting. (54a)

[3] Trustee Bernstein died before the trial and was dismissed as a defendant. (6a)

During the next few months, after several instances of misbehavior by petitioner, including angry attacks on faculty colleagues and administrators and a "bizarre tantrum" thrown during an interview with a visiting student, President Harleston decided that the Department needed new leadership after the expiration of petitioner's one-year term. (57a) He recommended the appointment of Edmund Gordon, a nationally-recognized scholar, to fill out the remaining two years of the term to which petitioner had been elected. At its March 1992 meeting, the Board of Trustees unanimously accepted the recommendation. (57a) Dr. Gordon assumed the Chair on August 1, 1992. Petitioner remained a tenured full professor, with no change in salary or benefits.

B. Proceedings in the District Court

Petitioner filed suit in the United States District Court for the Southern District of New York, pursuant to 42 U.S.C. § 1983, claiming that the denial of a full three-year term violated his rights under the First Amendment, the Due Process clause, and New York State law.[4] The case was tried in April and May of 1993.

Shortly before the presentation of evidence was to begin, respondents argued to the District Court that only some of the Albany speech involved matters of public concern and that, therefore, the jury should be asked to determine whether respondents' acts were motivated only by that portion of the speech directed at matters of public concern or, instead, by petitioner's personal abuse of colleagues. The district judge ruled that because most of the speech was concededly about matters of public concern, it did not matter whether respon-

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[4] The state law claims were dismissed before trial. The Due Process claims were dismissed following respondents' motion for judgment notwithstanding the verdict. The dismissal of those claims is not before this Court.

dents reacted only to certain parts of the speech that were not matters of public concern.[5] (82a-85a)

After the close of the evidence, the jury gave its verdict in three rounds of responses to interrogatories. In the first round, the jury determined that: (1) the Albany speech was a substantial motivating factor in the denial of a three-year term to petitioner; (2) petitioner would not have been denied the three-year term but for the Albany speech; (3) the Albany speech had no actual adverse impact on the operations of the Department, City College, or The City University; (4) respondents were, however, motivated by a reasonable expectation that the speech would have such an impact. (76a-77a)

Following that verdict, the District Court performed the balancing required by *Pickering v. Board of Education*, 391 U.S. 563 (1968). The District Court held that respondents were required to show *actual* impairment of government operations before an employee could be disciplined for speech on a matter of public concern, and that a reasonable *expectation* of such harm was insufficient. (76a-81a) Because the jury had found no such actual impairment, the district judge sent the jury a second round of interrogatories to determine which individual defendants would be held liable. (*Id.*)

The jury was asked whether the Albany speech was a substantial motivating factor in the actions of each individual defendant. The jury determined that the actions of nine of the Trustees—James Murphy, Gladys Carrion, Louis Cenci, Michael Del Giudice, Stanley Fink, William Howard, Susan Moore Mouner, Calvin Pressley, and Thomas Tam—had not been motivated by the speech. (60a) Six defendants—Bernard Harleston, W. Ann Reynolds, Edith Everett, Herman Badillo,

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[5] *Waters* has since made clear that "[t]he *Connick* test is to be applied to *the speech for which [the employee] was fired.* An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements." 511 U.S. ___, 114 S.Ct. at 1891 (emphasis added, citations omitted).

Sylvia Bloom, and Harold Jacobs—were found to have been motivated substantially by the Albany speech. (60a)

In a final round of interrogatories restricted to these six defendants, the jury assessed punitive damages of varying amounts against each. (93a-96a) The District Court upheld these determinations on a motion for judgment notwithstanding the verdict. (61a) It also directed that petitioner be reinstated as Department Chair for a two-year term ending June 30, 1995. (*Id.*)

C. The Court of Appeals' Decision

Respondents appealed to the United States Court of Appeals for the Second Circuit seeking reversal of the District Court's judgment or a new trial. Petitioner did not cross-appeal either the jury's finding that respondents were motivated by a reasonable expectation of disruption or the exoneration of the nine Trustee respondents. The Court of Appeals affirmed the District Court's decisions that petitioner's rights were violated, that respondents were not entitled to qualified immunity, and that petitioner should be reinstated. (75a)

The Court of Appeals held, however, that the award of punitive damages was infected by a fatal inconsistency between the jury's finding that respondents' actions were motivated by a reasonable expectation of disruption to City College's operations and its subsequent finding that they acted with malicious intent or reckless disregard of petitioner's rights. (73a) Consequently, the Court of Appeals vacated the punitive damages award and remanded for a new trial solely to determine whether petitioner should recover punitive damages from the six remaining respondents. (75a)

D. Proceedings in This Court

Respondents petitioned this Court for a writ of certiorari on July 18, 1994. On November 14, 1994, the Court granted the

petition, vacated the judgment of the Court of Appeals and remanded for further consideration in light of *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994). (15a)

E. Proceedings On Remand

On remand, the Court of Appeals called for letter briefs on the application of *Waters* to this case. (16a-49a) On April 4, 1995, the Court of Appeals reversed the judgment of the District Court and directed the entry of judgment for respondents. (1a-14a)

The Court of Appeals read *Waters* to hold that "the government's burden is to make a substantial showing of *likely* interference and not *actual* disruption" in the employer's operations. (10a) Here, the jury determined that respondents had made just such a substantial showing. (11a) Because respondents had made such a showing, the Court of Appeals then had to determine whether "the potential disruptiveness is enough to outweigh the value of the speech." (10a) The Court of Appeals held that, "as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech might have had." (11a)

Ordinarily, this determination would have required the entry of judgment for defendants. (11a) In this case, however, there was still the matter of the inconsistent verdicts. The six defendants found liable had been found *both* to have been motivated by a reasonable fear of disruption and to have been animated by malicious intent to violate petitioner's rights or a callous disregard for those rights. (11a-12a) Because these findings were hopelessly irreconcilable, a new trial would normally have been required. (12a) In this case, however, "elementary principles of causation compel[led] the conclusion" that petitioner's rights had not been violated. (12a) Because the jury had found that at least nine Trustees, constituting a majority of those who voted, had not been motivated by the speech, the Court of Appeals held that the

innocent action of the nine Trustees was a superseding cause breaking the causal chain between the possibly tainted motives of the other respondents and the action taken. (13a) Therefore, no new trial was necessary because the question of the other six respondents' motives would be of only academic interest.

REASONS FOR DENYING THE WRIT

The legal issues raised in the petition are well-settled and recently-reaffirmed by this Court. There is also no conflict among the lower courts about the applicable legal standard. All that is involved here is the particular application of those principles to the specific facts, no longer disputable, of this specific case. Petitioner's arguments—except to the extent that they seem to seek reconsideration of *Waters* and, by extension, the *Pickering* line of cases[6]—rest mainly on a misconception of what the Court of Appeals did and on a claim never pressed below.

Moreover, the lack of practical consequences in this individual case counsels against further review. Petitioner has served out his full reinstated term as Chair despite the Court of Appeals decision and then voluntarily declined to seek reelection to another term. Therefore, whatever this Court might decide, he has no further claim on the Department Chair, mooting any claim for injunctive relief. In addition, petitioner never sought compensatory damages and, given the history of this case, qualified immunity would surely bar an award of punitive damages.

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[6] Such reconsideration appears to be the real argument of petitioner's Point IV. *See* Pet., pp. 24-25.

A. The Court of Appeals Performed the *Pickering* Balancing

Contrary to petitioner's assertion (Pet., pp. 12-13), the Court of Appeals did not "pa[y] only minor lip service to the balancing requirement detailed in *Pickering*, and then ignore[ ] it altogether." (Pet., p. 13) The Court of Appeals twice set forth what the *Pickering* balancing test required (10a, 11a), and specifically concluded "that, as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech may have had." (11a) The discussion of the balancing process in its April 4, 1995 opinion may have been terse, but the Court of Appeals was by then going over familiar ground. *See* April 18, 1994 opinion, 50a-75a; District Court Order, May 11, 1993, 76a-81a. *See also* District Court Opinion and Order, August 4, 1993 (pp. 27a-82a in July 18, 1994 petition for certiorari). The Court of Appeals was not obliged to restate the entire balancing process in order to apply *Waters* and announce a new result. Petitioner's real complaint is not that the Court of Appeals failed to apply the *Pickering* balancing test, but that it reached the wrong conclusion. The Court of Appeals' fact-specific balancing of the interests in this individual case, however, raises no issue warranting review by this Court.

B. Petitioner Cannot Now Challenge the Jury's Finding That Respondents Had a Reasonable Expectation of Disruption

Petitioner also claims that, largely because the Albany speech took place after-hours and away from the office, and did not involve criticism of his employer or his employer's policies, "[a]ll of the foregoing must lead us to the conclusion that the Respondents had no basis upon which to act." (Pet., p. 17) He claims as well that the ultimate absence of actual harm has some relevance in determining the reasonableness of

the employer's earlier expectations.[7] (Pet., pp. 22, 25) Petitioner suggests, therefore, that the jury's finding that respondents had a reasonable expectation of disruption was unreasonable and not based on evidence. (Pet., p. 15) During the first appeal to the Court of Appeals, however, petitioner had his opportunity to contest the jury's finding but failed to do so. Because the question petitioner now presses upon this Court was neither raised in nor passed upon by the Court of Appeals, petitioner cannot raise it now. *City of Springfield v. Kibbe*, 480 U.S. 263 (1987).

Every fact petitioner now cites was known to the jury, which decided against him.[8] Every argument he now makes could have been made to the jury to help it decide whether respondents' expectations of disruption were reasonable, or to the Court of Appeals to overturn the verdict. Although petitioner complains that "[r]espondents have the benefit of an affirmative defense handed to them which they did not have the burden of having to prove at trial," (Pet., p. 21), respondents *did* prove it to the satisfaction of the jury, and it is now too late to question the basis for the jury's verdict.

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[7] The jury unavoidably considered the reasonableness of respondents' expectations with the knowledge, unavailable to respondents at the time they acted, of actual events. The jury presumably gave such weight as it saw fit to the actual course of events in deciding whether to credit respondents' testimony about their expectations and in assessing the reasonableness of those expectations.

[8] It is simply false, therefore, to suggest that "Petitioner is burdened with the disadvantage of not having had an opportunity to hear and fully respond in the factual record to Respondents' now dominant position, to wit, that it acted based on a reasonable expectation of disruption." (Pet., p. 21) That question could not have been submitted to the jury if it had not been raised at trial and if there had not been evidence in the record sufficient to support a finding on it. If the District Court erred in submitting the question to the jury, petitioner's failure to object then, and, indeed, until now, precludes him from objecting for the first time in this Court.

C. A Government Employer Is Not Precluded From Acting Against an Employee Merely Because the Employee's Speech Occurred Away From Work or Did Not Relate Directly to Work

Petitioner appears to claim that a government employee's speech must occur on the job or directly relate to his employer or employment before an employer can act upon it. (Pet., pp. 15-16) This Court has made clear, however, that a government employer's ability to discipline an employee does not rest on such mechanically-applied considerations. Although the speech in this case was made during the summer rather than during the school year, in Albany rather than on campus, at a function not connected with his employer[9], and did not involve direct criticism of his employer (although it did insult his colleagues), those facts do not preclude an employer from acting on the basis of such a speech.

As this Court explained in *Waters*, the legal test is not whether the speech in question is *related* to the employee's job, but whether it either has an impact on the employer's operations or is reasonably anticipated to have such an impact. *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 1887 (1994); *Connick v. Myers*, 461 U.S. 138, 152 (1983). Petitioner's speech—at least that part of it touching on matters of public concern—dealt with subjects within the realm of his professional expertise, about which he teaches at City College. What an academic department chair says in public about his own specialty, and how he says it, affects the academic reputation of his departmental colleagues and his employer. An academic department chair whose extracurricular remarks embroil him in controversy may find himself too distracted from his administrative duties or discredited in his personal standing with his colleagues to do his job, in contrast to a faculty member, for whom an engrossing controversy over his

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[9] Petitioner was, however, introduced to the audience as the Chair of the Black Studies Department at City College. (54a)

views may simply be proof that he is doing his job. Moreover, City College officials would not have to wait for the damage to be done before they could act.

The rule for which petitioner apparently argues was implicitly rejected by the many cases in which it could have been easily applied but was not. Ardith Rankin's intemperately expressed regrets at the failure of a Presidential assassination attempt, though made in her office during working hours, were not job-related. *Rankin v. McPherson*, 483 U.S. 378 (1987). Robert Perry and Marvin Pickering, though critical of their employers, were speaking on their own time. *Perry v. Sinderman*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968) In *United States v. National Treasury Employee's Union*, ___ U.S. ___, 115 S.Ct. 1003 (1995), the budding Hawthornes, Melvilles, Whitmans, and Cranes who challenged the restriction on writing for fees were, for the most part, concerned with after hours, off-site speech unrelated to their jobs. In none of these cases was the job-relatedness of the speech's location or content a factor warranting more than passing mention. Indeed, even a case that petitioner cites with approval, *Tindle v. Caudell*, 1995 WL 341529 (8th Cir.), shows that off-duty speech unrelated to one's job can be a basis for discipline. Kevin Tindle, a white Arkansas policeman, attended a Halloween party at a Fraternal Order of Police Lodge dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon. For this, he was suspended for 30 days, and the court upheld the suspension.[10]

It is certainly true that speech made on the job and about the job may, generally, have a greater disruptive effect on

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[10] The Eighth Circuit did suggest that because the party was held at the Fraternal Order of Police Lodge it was related to his work. Similar reasoning, however, leads to the conclusion that a speech given by a professor of Black Studies at a conference on Black Arts and Culture on a subject within the scope of his professional expertise is at least as job-related as a party for off-duty police.

government operations than speech made after hours, off-site, and on other subjects, and may, therefore, generally weigh more heavily in the employer's favor in the *Pickering* balancing. However, no decision of this Court has held or even suggested that only speech made on the job or about the job can give rise to a reasonable expectation of disruption sufficient to outweigh the employee's First Amendment rights. Petitioner thus goes too far in suggesting that simply because he spoke on his own time, out of town, and not about his employer "there is a real question as to whether it is legitimate to conclude that such speech, under such circumstances, can be the legitimate concern of the government." (Pet., p. 16) On the contrary, under this Court's precedents there is no such question at all.

Ultimately, petitioner seeks review in this Court either to correct the specific application of undisputed legal principles to facts he can no longer challenge or to reconsider a recent reaffirmation of settled law. Neither issue provides a basis for further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
August 3, 1995

Respectfully submitted,

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